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No. 119 Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF CONNECTICUT, *et al.*,
Plaintiffs,

v.

STATE OF NEW HAMPSHIRE,
Defendant.

REPLY BRIEF OF UNITED ILLUMINATING CO., ET AL., IN SUPPORT OF MOTION TO INTERVENE

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In its response to our Motion to Intervene, New Hampshire goes back and forth on its arguments about intervention depending on its speculation about whether, and to what extent, the utilities pass on the tax to their customers. Despite their variety, none of the arguments amounts to a sound basis for opposing intervention.

1. It is hardly a ground for opposing intervention by the utilities to say that they may not be able to pass through the tax to consumers of electricity. Although the utilities expect that most or all of the tax will be passed through, the possibility of their having to absorb some tax burden is a strong reason *in favor of* their intervention. It is true, of course, that the utilities could seek redress in the New Hampshire courts, but the availability of that course, for reasons that we have stated before, should not bar the utilities from presenting their claims in a case

already pending before this Court. *See* Brief in Support of Motion to Intervene at 6. For reasons of both fairness and efficiency, intervenors should be granted the right to assert their own interests in this case.

New Hampshire does not, in fact, appear to argue that the inability to pass on the Seabrook Tax should disqualify the utilities from intervention; rather, it seems, without actually saying so, to be raising again its argument that the Court should not be exercising jurisdiction in this case.* The short answer to that notion is that the bridge has already been crossed: the Court has granted leave for the plaintiff States to file their complaint, doing so in the face of this same conjecture by New Hampshire that consumers may not ultimately be burdened by the tax. Moreover, and in any event, the utilities are not asserting that consumers will bear no substantial burden from the tax—only that, at this point, we cannot be sure that they will bear all of it. The utilities thus have a genuine interest of their own to protect.

2. Even if every penny of the tax were to be passed on to consumers, the utilities should still be permitted to intervene. As we have previously noted, the passing-on of an unconstitutional tax raises prices and depresses demand. *See* Brief in Support of Motion to Intervene at 5. The utilities' interest in avoiding adverse effects on sales —as well as resistence from regulators to other, independently justified price increases—is an interest separate from, and in addition to, the interest of consumers in avoiding higher prices.

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* In this regard, New Hampshire seeks to rely on *Arizona v. New Mexico*, 425 U.S. 794 (1976), where the Court declined to exercise original jurisdiction. But, unlike the situation there, none of the utilities in this case is a political subdivision of a plaintiff state with an already pending challenge to the tax in another forum. *See Maryland v. Louisiana*, 451 U.S. 725, 743 (1981) (distinguishing *Arizona v. New Mexico* on such grounds). Moreover, each of the utilities in this case has paid the tax, and each utility has sought, or will seek, to pass the tax on to its customers. *See id.* (same).

The cases relied on by New Hampshire—principally *New Jersey v. New York*, 345 U.S. 369 (1953)—are wholly beside the point. The utilities are not asserting a generalized interest as citizens of the plaintiff states—an interest already represented by the states in their capacity of *parens patriae*. Rather, the utilities are asserting that their own economic interests are directly affected by the imposition of the tax. It is just that sort of immediate, concrete interest for which intervention has been thought appropriate. See 7C C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, § 1908, at 285 (1986).

The utilities thus stand in essentially the same position as the pipeline companies that were permitted to intervene in *Maryland v. Louisiana*, 451 U.S. 725 (1981). Although New Hampshire speculates that a web of special factors in that case may have led this Court to make "an exception to the restrictive intervention standards for *parens patriae* cases," Response at 6 n.2, that theory is simply misguided. The pipeline companies in *Maryland v. Louisiana* were not seeking to intervene *as citizens* in order to assert an interest in common with most or all other citizens of the plaintiff states: they sought to intervene *as taxpayers* directly subject to the challenged tax. Noting that fact, the Court in *Maryland v. Louisiana* found that the pipelines "ha[d] a direct stake in th[e] controversy." 451 U.S. at 745 n.21. Intervenors—the actual taxpayers here—have precisely the same "direct stake" in the outcome of this case.

CONCLUSION

The Motion for Leave to Intervene should be granted.

Respectfully submitted,

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